

EXPERT TESTIMONY – RAMÓN LUIS NIEVES, ESQ.

on behalf of:

**PUERTO RICO INSTITUTE FOR COMPETITIVENESS
AND SUSTAINABLE ECONOMY (ICSE-PR)**

Q. State your name.

Ramón-Luis Nieves.

Q. State your business mailing address.

Ave. Hostos #430, Urb. El Vedado, Hato Rey, PR, 00918.

Q. State your educational background.

- LL.M. Energy Law (candidate, May 2023), Vermont Law and Graduate School
- J.D., University of Puerto Rico Law School, 2000
- B.A., Cum Laude, Sociology, University of Puerto Rico-Río Piedras, 1996

Q. Describe your professional experience and qualifications.

I have worked as an attorney since 2001: more than two decades of professional experience in banking and financial institution law, energy law and policy, legislation and government affairs, regulatory matters, notarial law, contract law, real estate, consumer law, litigation, and appellate practice.

After several years working as a trial attorney (2001-2004), I was retained as vice president and in-house counsel of R&G Financial Corporation, a publicly traded financial institution (2004-2010).

In 2012, I was elected senator for the District of San Juan, Puerto Rico. During my tenure in the Senate of Puerto Rico (2013-2016), I had the privilege of serving as

Chairman of the Committee on Energy, as well as the Committee on Banking, Insurance, and Telecommunications.

While in the Senate, I championed legislation for energy reform (Act No. 57-2014), which created the Puerto Rico Energy Bureau (PREB), as well as new mandates for P.R.E.P.A. and the energy sector. I sponsored Act No. 22-2016, which reformed and/or eliminated energy subsidies; included legislative mandates in Act No. 4-2016 to prohibit political intervention in P.R.E.P.A. and sponsored Act No. 133-2016 to facilitate net metering and authorize microgrids and community-shared solar.

As an advisor to senator Eduardo Bhatia Gautier, I collaborated in the drafting of Act No. 17-2019, the Puerto Rico Energy Public Policy Act, as well as Act No. 258-2018, to authorize the organization of electric cooperatives in Puerto Rico.

As a senator, and from the private sector, I have helped shape most energy legislation enacted in Puerto Rico since 2013. As an advisor to nonprofits, I procured the first certifications for community-controlled microgrids before the PREB.

I am a frequent speaker and commentator on energy issues – both in local and U.S. national media. In 2017, a subcommittee of the U.S. Congress invited me to testify regarding the state of the energy grid in the aftermath of Hurricane María. On May 4, 2022, I provided testimony to the Finance Committee of the House of Representatives regarding P.R.E.P.A.'s debt.

The following are some of my op-eds published in recent years:

- *In the wake of hurricane destruction, Biden is supporting Puerto Rico's clean energy transition*, The Hill (January 26, 2023)
- *The community effort to bounce back from Puerto Rico's eight-month blackout*, The Hill (September 30, 2018)
- *'America's Greece' and its Insolvent Energy Utility*, Utility Dive (April 11, 2017)
- *Puerto Rico needs a New Energy Grid (not just repairs to the old one)*, The Hill (October 1, 2017)
- *Privatizing Puerto Rico's energy utility could be Whitefish 2.0*, The Hill (February 5, 2018)

Currently, I am pursuing an Energy Law LLM from Vermont Law and Graduate School (May 2023). My final research project will review the development, potential and challenges of implementing Puerto Rico's energy policy.

The following are my bar admissions:

- Commonwealth of Puerto Rico - January 2001
- U.S. District Court - District of Puerto Rico – January 2002
- U.S. Court of Appeals 1st Circuit – March 2001
- U.S. Supreme Court – June 2006
- Licensed notary public – December 2001

These are some of the energy-related organizations for which I have served as a member:

- Energy Bar Association – (2022-present)
- Council of State Governments (CSG) - National Board Member / Henry Toll Fellow / Energy & Environment Committee (2013-2016)
- Southern States Regional Energy Board (2013-2016)
- Puerto Rico Manufacturers Association - Committee on Energy (2018-2019)

Q. State whether you have previously testified or presented before the Title III Court and list the occasions.

No.

Q. State on whose behalf you are testifying before the Title III Court.

I am testifying on behalf of the Puerto Rico Institute for Competitiveness and Sustainable Economy (ICSE-PR).

Q. List the documents you considered for your testimony.

A. Second Amended Plan of Adjustment for the Puerto Rico Electric Power Authority (P.R.E.P.A.) and all associated schedules (February 26, 2023).

B. Disclosure Statement for Second Amended Title III Plan of Adjustment for P.R.E.P.A. and all associated exhibits. (February 26, 2023)

C. Integrated Resource Plan (I.R.P.)

D. Final Resolution and Order – In re: Integrated Resource Plan, Case No. CEPR-AP-2018-0001 (August 24, 2020)

E. All documents, statutes and secondary sources cited in the footnotes to this report/testimony.

II. Expert testimony

Q. Describe the purpose of your direct testimony.

The purpose of my testimony is to show that the Second Amended Plan of Adjustment (SAPOA) for P.R.E.P.A. runs counter to Puerto Rico's energy public policy.

103 In preparing this testimony, I have relied on my general knowledge, research,
104 training, experience, and expertise.

105 My work on this matter is ongoing. I may review additional materials or
106 conduct further analysis. I reserve the right to update, refine, or revise this testimony
107 as appropriate.

108 **Q. Is it your opinion that the Plan is compatible with the public policy concerning**
109 **Electric Energy Transformation as mandated by Act No. 17-2019?**

110 To answer this question, we must first discuss the origins of P.R.E.P.A. The
111 purpose of creating P.R.E.P.A. in 1941 (as the Puerto Rico Water Resources
112 Authority)¹ was precisely to raise funds for the development of electric infrastructure
113 through its independent, bond-issuing authority.

114 We will also look at the energy policy mandates that emerged from Act No. 57-
115 2014 and Act No. 17-2019: Puerto Rico's current energy policy.

116 I will also address an important “elephant in the room”: the lack of willingness
117 of the Federal Oversight and Management Board (F.O.M.B.) to question the
118 legitimacy of the P.R.E.P.A. bonds issued during the years 2010-2013 – precisely the
119 period of the utility's financial collapse.

120 I. THE STRUGGLE TO ENACT A “BOND LAW” FOR PUERTO RICO’S “LITTLE T.V.A.”

¹ Pursuant to Act No. 57 of March 30, 1979, the Legislature of Puerto Rico changed the corporate name of the P.R.W.R.A. to the Puerto Rico Electric Power Authority (P.R.E.P.A.). Changing the utility's name made sense: by 1979, fossil fuel generation had displaced hydroelectric generation, which then represented a mere 2% of total energy generation in the Island.

Antonio S. Lucchetti is the father of public power in Puerto Rico. Born in Ponce, Puerto Rico, 1888, Lucchetti obtained an engineering degree from Cornell University in 1910. On that same year, Lucchetti started working for the government of Puerto Rico, as an operator for the South Coast Irrigation Service created under the Public Irrigation Act of 1908.

In 1926, the government of Puerto Rico created Utilization of the Water Resources (U.W.R.) [Utilización de las Fuentes Fluviales, (U.F.F.)], as a division of the local Commission of Interior. Lucchetti pushed for the creation of U.W.R. and, in 1926, became its first (and only) Engineer-Director.

Lucchetti worked tirelessly for 42 years to build and consolidate public power for the People of Puerto Rico: from 1910 until his passing in 1952.

The Engineer-Director of the U.W.R. sought to create a government-owned, interconnected, energy system. This, to further the economic development and social objectives of Puerto Rico.

From the late 1920s to the 1930s, Lucchetti continued his efforts to consolidate the energy systems on the Island into a single governmental entity. Modeled on the Tennessee Valley Authority,² the Engineer-Director of U.W.R. proposed organizing a

² 16 U.S.C. § 831 et seq. The Tennessee Valley Authority (T.V.A.) “was created in 1933, one of the ‘alphabet soup’ projects championed by President Franklin Delano Roosevelt as a way to get a flagging country back on its feet during the Great Depression. [...] Care was taken in the act to ensure that power produced by TVA would be carefully distributed throughout the Valley to modernize rural communities and to encourage economic development—and that rates would always remain as low as feasible.” Tennessee Valley Authority, *The TVA Act*, <https://www.tva.com/about-tva/our-history/the-tva-act>

public corporation for the energy system of Puerto Rico. This, to circumvent the budget and bond-issuing limitations of the central government of Puerto Rico imposed by the Organic Act of Puerto Rico, the Jones Act of 1917. The road to create Puerto Rico's first public corporation would prove to be a rocky and controversial political fight.

Lucchetti asked the U.S. Department of Interior to prepare a draft bill to create the Puerto Rico Water Resources Authority. At the behest of Lucchetti, the draft bill was prepared by counsel for the Department of Interior and the Public Works Administration. The bill was submitted to the local legislature in 1938. The legislation was considered, vetoed, and refiled without success several times, until 1940. Since the local legislature failed to create the proposed water resources corporation, Lucchetti sought help elsewhere.

Congressman Leo Kocialskowsky (D-IL 8th) filed H. R. 8239 to create a Puerto Rico Water Resources Authority (P.R.W.R.A.) by federal statute.³ The bill was introduced at the request of the Department of the Interior.⁴ Secretary Harold Ickes appeared before the congressional committee to support H. R. 8239. In his statement, Ickes stated that, by 1940, public power served 50% of the Island.⁵ Although the public system basically served rural areas – for agricultural purposes – it also began

³ H. R. 8239, 76th Cong. (3rd Sess. 1940).

⁴ *Creating the Puerto Rico Water Resources Authority*, Hearings before the Committee on Insular Affairs, House of Representatives, U.S. Congress, March 19-22, 25, 27-29, April 15, 16, 18 and 19, 1940, at 40.

⁵ *Id.*, at 11.

156 providing access to electricity in rural, poor, areas underserved by private energy
157 companies. ⁶ U.W.R. oversaw the process of rural electrification in Puerto Rico.

158 By 1935, there were no local funds available to add additional generation
159 capacity to the system. ⁷ Starting in 1935, federal aid granted under the auspices of
160 the Puerto Rico Reconstruction Administration (P.R.E.R.A.), helped double the public
161 system's generation capacity, as well as the local distribution network. ⁸

162 According to Ickes and Lucchetti, the main reason for proposing the creation
163 of the P.R.W.R.A. was **financial**. ⁹ According to David Speck, assistant solicitor
164 general of the Department of the Interior, H. R. 8239 proposed basically “a **bond**
165 **law**”.¹⁰ The development of Puerto Rico's energy system could not continue depending
166 on occasional federal or local aid. Organizing P.R.W.R.A. as a public corporation
167 would allow it to finance its projects through

168 “corporate revenue bonds payable solely from the income of the corporate
169 enterprises. It would not be permitted to pledge the full faith and credit of the
170 people of Puerto Rico for the payment of its bonds, or to have access to the
171 taxing power of the Insular Government or any of its political subdivisions.” ¹¹

172 Ickes further stated that

173 “The sections of the bill which provide for this means of financing the
174 enterprises of the [P.R.W.R.A.] are not new in any respect. They follow in
175 substance the provisions of State laws for State-wide and municipal corporate
176 agencies which have been enacted in recent years in nearly all of the States of

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id., at 11 and 19.

¹⁰ Id., at 427.

¹¹ Id., at 12.

the Union to provide a businesslike means of financing the acquisition and improvement of comparable State and municipal public utilities.”¹²

Congressman Richard J. Welch asked Ickes whether revenue bonds issued by the P.R.W.R.A. would find a ready market. Ickes was confident that the future development of the Island would guarantee a “sure and growing market for your product, namely, power, which would yield a revenue sufficient to service the bonds.”¹³ As the bill proposed, he added, “[y]ou have the right to make the rates high enough to service your bonds”.¹⁴

The Puerto Rico Legislature opposed passage of H. R. 8239. The Legislature pointed out that the bill deprived the Public Service Commission – created by the Organic Act of 1917 – from jurisdiction over energy rates in Puerto Rico.¹⁵ They also affirmed that the main object of the bill was to

“create a supergovernment in Puerto Rico with no supervision and answerable neither to the Governor of Puerto Rico nor to the legislature of the Island. In other words, the ‘Authority’ is free to do as it pleases and is responsible to no one [...]”.¹⁶

Bolívar Pagán, resident commissioner of Puerto Rico, also opposed passage of H. R. 8239. Pagán opposed granting the P.R.W.R.A. sole, unsupervised ratemaking authority, instead of continuing the rate review process then performed by the Public

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id., at 238.

¹⁶ Id.

Service Commission.¹⁷ Also, he opposed that the Authority be empowered to issue bonds “without limit and without securing the approval of anyone.”¹⁸

Congress failed to act on H. R. 8239. But political change was on the horizon.

II. THE “BOND LAW” – ACT NO. 83, 1941

A new political movement, the Partido Popular Democrático (Popular Democratic Party), defeated the Republican-Socialist Coalition in the 1940 elections. Luis Muñoz Marín, leader of the Partido Popular, became President of the Senate of Puerto Rico. An ally of President Roosevelt, Muñoz Marín made substantial political capital as the New Deal’s point person in Puerto Rico.

Time was on Lucchetti’s side. On May 2, 1941, the government of Puerto Rico enacted the Puerto Rico Water Resources Authority Act.¹⁹ Act No. 83 had basically the same content and structure of H. R. 8239 – almost word-for-word - which intended to create P.R.W.R.A. by federal law. Hence, the act creating the P.R.W.R.A. was basically drafted by the U.S. government.

Contrary to previous acts (specifically Joint Resolution 36 of 1927 / Act No. 93 of 1938), this statute lacked any specific energy policy mandates or goals.²⁰ Act No.

¹⁷ Id., at 397.

¹⁸ Id.

¹⁹ Act No. 83 of May 2, 1941, 22 L.P.R.A. § 191 et seq. Due to his fundamental role in the modernization and industrialization of Puerto Rico, some commentators incorrectly state that the P.R.W.R.A. was created under Governor Rexford Guy Tugwell. In fact, Act No. 83 was enacted under Governor Guy Swope. Tugwell was appointed Governor by Roosevelt months after the enactment of Act No. 83.

²⁰ Section 22a of the Act vaguely stated that the P.R.W.R.A. was created for the following purposes: the conservation of natural resources, the promotion of the general welfare, and the increase of commerce and prosperity.

214 83 was a basic “bond law”, as originally framed by counsel for the federal agencies in
215 1938.

216 P.R.W.R.A. was a self-regulated entity, with independent ratemaking
217 authority. Later, when it achieved full control of the Island’s generation, distribution,
218 and transmission assets, it became a vertically integrated public monopoly, “with the
219 capacity to fully pass all operating costs to its customers, with absolutely no
220 incentives whatsoever to streamline its operations.” ²¹

221 As originally conceived by Lucchetti and counsel for the federal government,
222 Act No. 83 retained its identity and content as a “bond law”: a legal mechanism
223 allowing P.R.W.R.A. to issue bonds on its own, with no intervention from the
224 Legislature or from the central government.

225 Soon after P.R.W.R.A. was created, Lucchetti and Governor Rexford Guy
226 Tugwell sought to acquire the remaining private energy companies operating on the
227 Island: Puerto Rico Railway Light & Power, Inc. (P.R.R.L.P.) and the Mayaguez Light
228 Power & Ice Co. (M.L.P.I.). ²² Tugwell met with President Roosevelt in Washington
229 D.C. and convinced him to use his war powers to order the expropriation of these
230 companies.²³ Roosevelt signed a letter to that effect during the meeting. P.R.R.L.P.
231 successfully challenged Roosevelt’s order in federal court. ²⁴ Later, in 1944, P.R.R.L.P.

²¹ Sergio Marxuach, *Rethinking the Governance of State-Owned Enterprises in Puerto Rico*, 6 (2012)
https://grupocne.org/wp-content/uploads/2012/01/2012_01_PolicyBrief_RethinkingGovernance.pdf

²² EUGENIO LATIMER TORRES, HISTORIA DE LA AUTORIDAD DE ENERGÍA ELÉCTRICA, 404 (1997).

²³ Id.

²⁴ Puerto Rico Ry. Light & Power Co. v. United States, 131 F.2d 491 (1942).

and M.L.P.I. were expropriated. The P.R.W.R.A.'s first ever bond issue – for \$20,000,00.00 – was used to finance the acquisition of both companies.²⁵

In his memoirs, Governor Tugwell reflected on P.R.W.R.A.'s first bond issue:

*“I felt that the price we paid was outrageous; but we had done our best. That it was a good investment, however, we had the assurance of the New York bankers who loaned us the funds for the purchase as well as for extensions and improvements [...] In fact, when we finally came to the point of paying too much and borrowing under conditions and at rates calculated to please Wall Street, we were suddenly regarded benignly by all the powers that be. I had thought that we ought to be castigated for the deal. But that did not happen. There was not a word of criticism and a good deal of congratulation. **The people of Puerto Rico would pay for it over a period of some twenty years in inflated rates; but absolutely no one showed any concern over that.**”*²⁶ (Emphasis added).

The seeds of P.R.E.P.A.'s financial problems – which have led to the current bankruptcy process – were sown since the creation of the public corporation, and its first bond issue (1946).

III. P.R.E.P.A.'S COLLAPSE (OR HOW TO BANKRUPT A MONOPOLY)

It took four (4) decades for P.R.E.P.A. to achieve the full electrification of the Island. This amazing achievement helped Puerto Rico support its aggressive industrialization program, as well as profound social justice objectives for the people. P.R.E.P.A. helped most residents of Puerto Rico gain access to electricity.

But after several decades of growth and achievements, P.R.E.P.A. started walking a dangerous road that would lead to its collapse.

²⁵ *Creating the Puerto Rico Water Resources Authority*, supra note 4, at 405.

²⁶ REXFORD G. TUGWELL, *THE STRICKEN LAND: THE STORY OF PUERTO RICO*, 345 (1946).

256 As previously stated, P.R.E.P.A. was created as a self-regulated entity. Legally,
257 its governing board was supposed to act as its regulator. In practice, the governing
258 board failed to properly exercise oversight over P.R.E.P.A. Over the years, critics of
259 P.R.E.P.A.'s board pointed out its lack of transparency, poor oversight over the
260 utility's performance and, in some cases, lack of knowledge about the energy industry.

261 Even though P.R.E.P.A. was an entity created by law, the Legislature failed to
262 exercise proper oversight over the public corporation. First, the complexity of energy
263 matters usually intimidated legislators. Generations of legislators would attest to
264 this experience: when a P.R.E.P.A. executive director or officer invoked the
265 "complexity" of any problem during a public hearing, the inquiry would usually end
266 just there. Throwing terms around like "wheeling", "net metering", or "integrated
267 resources plan" was enough to intimidate most legislators.

268 However, patronage was the most important factor which impeded proper
269 legislative oversight. The ability of any legislator to procure jobs for constituents at
270 P.R.E.P.A. was political currency. Generations of legislators would receive dozens –
271 even hundreds – of requests to either draft letters of recommendation or to place a
272 call to P.R.E.P.A. Salaries and benefits were usually higher at P.R.E.P.A. than in
273 other agencies of the government of Puerto Rico.

The Center for the New Economy effectively summarized the “rent-seeking” behavior of several special interest groups at P.R.E.P.A.²⁷ Others are also added: bondholders, employees, suppliers and contractors, politicians, subsidized individuals, municipalities, and the central government itself.

In hindsight, perhaps the Puerto Rico Legislature of 1940 turned out to be right. Decades later, P.R.E.P.A. became, as predicted,

“a supergovernment in Puerto Rico with no supervision and answerable neither to the Governor of Puerto Rico nor to the legislature of the Island. In other words, the ‘Authority’ is free to do as it pleases and is responsible to no one [...]”.²⁸

IV. PUERTO RICO’S ENERGY POLICY: REASONABLE COSTS, NON-DISCRIMINATORY RATES, CLEAN ENERGY TRANSITION

To determine whether the SAPOA undermines Puerto Rico’s current energy policy, we must discuss the relevant sections of Act No. 57-2014, and Act No. 17-2019.

A. Act No. 57-2014: the Puerto Rico Energy Transformation and RELIEF Act

After decades attempting to craft a coherent, and mandatory, energy policy, Act No. 57-2014 finally provided a clear and comprehensive policy for the People of Puerto Rico:

“Section 1.2.- Declaration of the Public Policy on Electric Power.”²⁹

The transformation and [restructuring] of our electric power system are essential to achieve the competitiveness and economic development of the

²⁷ Sergio Marxuach, *Restructuring Puerto Rico’s Energy Sector*, 50-51 (August 22, 2005) https://grupocne.org/wp-content/uploads/2005/08/2005_01_RestructuringElectricitySector_PREPA_Paper.pdf For an update to this report, please see Sergio Marxuach, *A New Look at Puerto Rico’s Electricity Sector* (January 2009) https://grupocne.org/wp-content/uploads/2009/01/2009_01_ANewLook_Electricity.pdf

²⁸ *Creating the Puerto Rico Water Resources Authority*, supra note 4, at 238.

²⁹ Original version of the statute, without amendments.

Commonwealth of Puerto Rico. For such reason, it is hereby declared as the public policy of the Commonwealth of Puerto Rico that:

(a) **The cost of the electric power generated, transmitted, and distributed in Puerto Rico shall be affordable, just, and nondiscriminatory for all consumers;**

[...]

(d) The implementation of strategies geared toward achieving efficiency in the generation, transmission, and distribution of electric power shall be sought in order to guarantee the availability and supply thereof **at an affordable, just, and reasonable cost;**

[...]

(g) The Island shall become a jurisdiction with diversified energy sources and high efficiency electric power generation. To achieve this, it shall be necessary to reduce our dependence on energy sources derived from fossil fuels, such as oil, and to develop short-, medium-, and long-term plans that allow us to establish a well-balanced and optimum energy portfolio for the electrical system of the Commonwealth of Puerto Rico;

(h) The maximum percentage of renewable energy that may be integrated and incorporated into Puerto Rico's electricity infrastructure in a safe and reliable manner and at a reasonable cost shall be identified and kept updated. Moreover, suitable technologies and locations shall also be identified to make such integration feasible in accordance with the best interest of the Commonwealth of Puerto Rico;

[...]

(m) Prices shall be based on the actual cost of the service provided, efficiency standards, or any other parameters recognized by government and nongovernmental organizations specialized in electric power service;

[...] (Emphasis added).

B. Act No. 17-2019: the Puerto Rico Energy Public Policy Act

The statute authorizing P.R.E.P.A.'s privatization, Act No. 120-2018 - the *Puerto Rico Electric Power System Transformation Act* - ordered the drafting of a new energy policy and regulatory framework for Puerto Rico.

The energy policy that emerged from an unprecedented process of collaboration amongst multiple stakeholders – Act No. 17-2019, the *Puerto Rico Energy Public Policy Act* – contained an ambitious mandate: an updated Renewable Portfolio Standard (R.P.S.) of 100% by 2050.³⁰

For the purposes of this testimony, the following are the relevant sections of Act No. 17-2019:

- Section 1.4. — *Guiding Principles of the Puerto Rico Electrical System.*

The activities or functions related to the electric power service shall be governed by the principles of efficiency, quality, continuity, adaptability, impartiality, solidarity, and equality.

i) The efficiency principle compels the correct allocation and use of resources **to guarantee that services are rendered at the lowest possible cost** and that resources which compose the Electrical System are developed according to the best industry practices; [...] (Emphasis added)

- Section 1.5. — 2050 Energy Public Policy.

It is hereby declared as public policy of the Government of Puerto Rico:

1) Universal Access to Electric Power Service

(a) **To guarantee that the cost of the electric power service in Puerto Rico be affordable, just, reasonable, and nondiscriminatory for all consumers in Puerto Rico.** When reviewing and approving the fees, rents, rates, and any other type

³⁰ Section 4.2 of Act No. 17-2019, the *Puerto Rico Energy Public Policy Act*, amended Section 2.3 of Act. No. 82-2010, as amended, the *Public Policy on Energy Diversification by Means of Sustainable and Alternative Renewable Energy in Puerto Rico Act*, to include a new R.P.S.: a 20% target of renewables by 2022; 40% by 2025; 60% by 2040, and 100% by 2050.

of charge that an electric power company seeks to impose, **the Energy Bureau shall evaluate the efforts made by the electric power company to maintain such fees, rents, rates, and any other type of charge as close as possible to the twenty cent (\$0.20) per kilowatt-hour goal established in the Certified Fiscal Plan for the Puerto Rico Electric Power Authority.** The Bureau shall be ultimately responsible for ensuring that the fees, rents, rates, and any other type of charge collected by the electric power company **are just and reasonable**, as well as consistent with sound fiscal and operational practices which result in a reliable service **at the lowest reasonable cost;** (Emphasis added).

2) Electric Power Service Model

[...]

(e) To establish an Electrical System model that maximizes the use of the energy resources available and that empowers the consumer to be part of the energy resources portfolio through the adoption of energy efficiency strategies, demand response, the installation of distributed generators, among others;

(f) To design an electric power grid that takes into account the development and integration of community solar, wheeling, the creation of microgrids, and electric cooperatives or energy cooperatives as alternatives and tools to improve the access to renewable energy and the electric power grid's resilience to natural disasters;

[...]

8) Distributed Energy, Energy Storage, and Technology Integration.

(a) To ensure the integration of renewable energy into the Electrical System in a safe and reliable manner and at a reasonable cost, as well as identify the appropriate technologies and sites, such as closed sanitary landfills and previously contaminated lands, that shall make such integration feasible in accordance with the best interests of Puerto Rico; and ensure the improvements necessary to achieve the metrics of the Renewable Portfolio Standard pursuant to Act No. 82-2010 are made;

[...]

10) Customer Service, Participation, and Transparency.

(a) To guarantee every consumer's right to receive a reliable, stable, and excellent electric power service at a cost that is accessible, just, and reasonable, a transparent and easy to understand bill, and a fast service response;

[...]

Section 1.6. — Initial Objectives.

The goal of the energy public policy is to achieve, among others, the following initial objectives:

[...]

4) To make it feasible for energy service consumers to become prosumers through programs such as the net metering program, the adoption of behind-the meter generation systems, among other mechanisms currently available or to be available in the future.

[...]

7) To reduce and eventually eliminate electric power generation from fossil fuels by integrating orderly and gradually alternative renewable energy while safeguarding the stability of the Electrical System and maximizing renewable energy resources in the short-, medium-, and longterm. For such purpose, a Renewable Portfolio Standard is established in order to achieve a minimum of forty percent (40%) on or before 2025; sixty percent (60%) on or before 2040; and one hundred percent (100%) on or before 2050.³¹

8) To facilitate the interconnection of distributed generation to the electric power grid through any available mechanism including, but not limited to, distributed generation, renewable energy sources, net metering, and the use of microgrids by implementing the mechanisms, strategies, and technologies available in the electric power industry for such purposes.

V. SAPOA AND PUERTO RICO'S ENERGY POLICY

For the purposes of this testimony, there are two main areas where SAPOA severely contradicts and affects Puerto Rico's energy policy: the economic impact of the proposed charges to energy customers to pay for P.R.E.P.A.'s legacy debt, and the impact of these charges in the clean energy transition envisioned by the Island's energy policy.

³¹ Act No. 17-2019 amended Section 2.3. of Act No. 82-2010: *Renewable Portfolio Standard* (22 L.P.R.A. § 8124): 2015 to 2022 20.0%; 2023 to 2025 40.0%; 2026 to 2040 60.0%; 2041 to 2050 100.0%.

413 According to the F.O.M.B., “The Plan proposes to cut P.R.E.P.A.’s more than
414 \$10 billion of debt and other claims by almost half, to approximately \$5.68 billion.” ³²
415 Attempting to cut almost by half a controversial and substantial debt may be
416 perceived as a great achievement. But the devil is in the details of the SAPOA.

417 The SAPOA provides for most energy customers in Puerto Rico to pay a
418 “Legacy Charge” for a period of 35 years, 2025-2058. Let’s examine SAPOA’s
419 definition of the “Legacy Charge”:

420 “Legacy Charge” means the hybrid fixed monthly flat fee and volumetric
421 charge by Reorganized PREPA to be included in Reorganized PREPA’s rates,
422 fees, and charges to its customers, as more fully described on Schedule B
423 hereto, as such Schedule B may be amended or modified up to and including
424 the Effective Date, to pay principal and interest on the New Bonds and any
425 Refunding Bonds, in structure and amounts that do not delay or extend the
426 Series A Bonds’ or the Series B Bonds’ expected repayment date and expected
427 weighted average life as set forth in the Fuel Line Lender PSA or the National
428 PSA, as applicable, and otherwise that are reasonably acceptable to the
429 Required Fuel Line Lenders.” ³³

430
431 The concept of a “Legacy Charge” is problematic. The so-called “Legacy
432 Charge” means that P.R.E.P.A. and its bondholders agree to burden present and
433 future energy customers with a charge not related to either capital improvements or
434 to cover operational costs. As discussed before, P.R.E.P.A. was created by a 1941
435 “bond law”, designed expressly to raise capital for the construction, expansion, and

³² F.O.M.B., *Oversight Board files amended proposed PREPA Plan of Adjustment: OVERSIGHT BOARD FILES AMENDED PROPOSED PREPA PLAN OF ADJUSTMENT Ensures Plan of Adjustment Remains Confirmable by The Court; Almost Half of Puerto Rico’s Households Would be Exempt From PREPA Legacy Charge up to Certain Level of Energy Consumption; Charge Subject to Approval by Energy Regulator* (February 9, 2023) https://drive.google.com/file/d/1IObIS1SXezfLxcPEKqS_mFY-DHjJth4w/view

³³ SAPOA, Article I(A)(129).

improvements to Puerto Rico's energy grid. January 1974's trust agreement between the utility and its bondholders is quite clear on the subject:

"WHEREAS, based upon surveys, estimates and recommendations, the Authority has found and determined **that it is necessary and advisable to provide funds for additional facilities for the generation, transmission and distribution of electricity to serve the present and prospective demands upon the System**, and has determined that it is necessary to increase its capacity to issue revenue bonds secured as hereinafter provided to provide funds for the foregoing purposes; and

WHEREAS, the Authority deems it advisable to make provision for the issuance from time to time of revenue bonds on a parity with the bonds issued initially under the provisions of this Agreement **for the purpose of paying all or any part of the cost of any Improvements** (as defined herein); [...] ³⁴ (Emphasis added).

Let's look at the definition of "Improvements" in the 1974 Trust Agreement:

"The word "Improvements" shall mean such improvements, renewals and replacements of the System or any part thereof and such extensions and additions thereto as may be necessary or desirable, in the judgment of the Board, to keep the same in proper condition for the safe, efficient and economic operation thereof and to integrate into the System unit or part thereof, and shall include such electric power projects as may be authorized to be acquired or constructed by the Authority under the provisions of the Authority Act and such improvements, renewals and replacements of such properties and the System and such extensions and additions thereto as may be necessary or desirable for continuous and efficient service to the public, which shall be financed in whole or in substantial part from the proceeds of bonds" ³⁵

What the SAPOA attempts to do is to turn the nature of P.R.E.P.A.'s 1941 act as a "bond law" into a self-fulfilling prophesy. The so-called "Legacy Charge" of the SAPOA is designed for the sole satisfaction of the bondholders – some who acquired their bonds when P.R.E.P.A.'s was clearly insolvent, intending to make a "killing" on

³⁴ Statement on January 1, 1974, Trust Agreement – Puerto Rico Water Resources Authority.

³⁵ Id., Section 101.

a future restructuring such as SAPOA proposes. The “Legacy Charge” in no way helps P.R.E.P.A. to perform “improvements” to Puerto Rico’s electric grid, the main reason why Lucchetti struggled to create a public corporation authorized to issue bonds.

Further, the F.O.M.B. admits on its Disclosure Statement the brutal impact of the Legacy Charge on unsubsidized energy customers in Puerto Rico:

“Because PREPA’s current rates, despite being among the highest in North America, are insufficient to fund legacy debt service and PREPA’s operating expenses, the Legacy Charge will be included in PREPA’s rates to allow for sufficient Net Revenues to provide a source of repayment for the New Bonds issued by PREPA under the Plan.”³⁶

This is a confusing, or perhaps cynical, statement from the F.O.M.B.: since P.R.E.P.A.’s rates are among the highest in North America, they propose to raise those rates even higher with the SAPOA. Have the proponents of the SAPOA considered the impact of the Legacy Charges in the economic development of a territory with a shrinking population, that lacks currently from a sustainable driver of growth (other than the temporary influx of federal funds)? The SAPOA and its disclosure lacks any analysis on the terrible impact of the “Legacy Charge” on the economic and social development of Puerto Rico.

But it gets worse. This is one of the disclosed “risks” of the SAPOA:

“PREPA’s collections may be worse than projected. Customer collections could be lower than currently forecasted in the Certified Fiscal Plan. PREPA may fail to collect or have difficulty collecting amounts due from its customers. If PREPA is unable to collect amounts due from customers at the rates projected

³⁶ *Disclosure Statement for Second Amended Title III Plan of Adjustment for PREPA*, 5 (February 26, 2023)

in the fiscal plan, the reduction in revenues could affect its ability to pay expenses and debt service and deliver services.”³⁷

The “Legacy Charge” shall consist, “collectively, of all applicable Flat Fees and Volumetric Charges” set at the levels for each customer class.”³⁸ The SAPOA then goes on to grant exemptions to the “Legacy Charge” to “for residential customers who, during such billing cycle, are classified as LRS, RH3, or RFR”.³⁹

Perhaps the best intentions of the F.O.M.B. to be fair to low income individuals ends creating discriminatory rates – contrary to Puerto Rico’s energy policy. Although one may sympathize with the F.O.M.B.’s intentions, we also must look at the facts.

The utility’s customers classified as LRS, RH3, or RFR qualify for energy subsidies, either locally legislated, or from programs of assistance from the U.S. government. Granting a well intentioned exemption to these customer classes discriminates against all nonsubsidized residential, commercial, and industrial customers. In fact, these exemptions unfairly place higher burdens on the nonsubsidized classes – contrary to Puerto Rico’s energy policy which prohibits discrimination in the imposition of rates and fees.

F.O.M.B. does not consider the impact of unfairly burdening nonsubsidized players of Puerto Rico’s economy – already burdened by the actions or inactions of the government of Puerto Rico and the F.O.M.B. What is the potential impact of the Legacy Charges on commercial and industrial customers? How will the Legacy

³⁷ Id., at 361.

³⁸ SAPOA, Schedule B (Legacy Charge).

³⁹ Id.

Charge impact job creation and economic development in Puerto Rico? The proponents of the SAPOA are silent – maybe clueless – as to the answers to these questions.

The F.O.M.B. unilaterally decided that they have the sole power under PROMESA to tamper with Puerto Rico’s energy policy – in this case the limitations to create new energy subsidies in Act No. 22-2016.⁴⁰ The SAPOA states a very limited and poor argument to justify preempting Puerto Rico’s policy on energy subsidies: “[t]his provision is preempted solely to the extent it could be interpreted to restrict the creation of a new subsidy for low-income customers relating to the Legacy Charge.”

The provision of Act No. 22-2016 which F.O.M.B. intends to unilaterally preempt was created for the purpose of protecting P.R.E.P.A.’s finances, blocking future irresponsible subsidies that could burden the utility. PROMESA in no way authorizes the F.O.M.B. to create subsidies on their own, with no legislative approval. Although well intentioned, the F.O.M.B. pretends to abuse its authority creating subsidies which are discriminatory to other consumer classes.

To add insult to injury, the F.O.M.B., P.R.E.P.A.’s managers and Governing Board, as well as Luma Energy, have failed in making sure that government clients (agencies and public corporations) pay up their substantial debts. While proposing this burdensome “Legacy Charge” on its nonsubsidized customers, F.O.M.B. has done

⁴⁰ *List of Main Statutes Preempted by PROMESA* - 22 L.P.R.A. § 814, to establish limitations to the future creation of any new electric power service subsidy, credit, or grant.”

nothing to make sure that P.R.E.P.A./LUMA's government clients pay off their debts – more than \$200 million, until July 2022.⁴¹ F.O.M.B. must also disclose its efforts, if any, to make sure that its subsidized customers are current on their payment plans with P.R.E.P.A./LUMA. Before the enactment of Act No. 22-2016, thousands of subsidized customers had outstanding debts that went uncollected by the utility. These are all measures that the F.O.M.B. should have taken before attempting to impose burdensome, discriminatory charges on most nonsubsidized customers.

VI. THE ELEPHANT IN THE ROOM: THE 2010-2013 ILLEGITIMATE BONDS

As with past versions of the Restructuring Support Agreement since 2015, the SAPOA hides under a rug one of the fundamental problems of P.R.E.P.A.'s debt.

In 2010, P.R.E.P.A. authorized 8 bond issues in an amount close to \$4 billion. Another bond issue was done in 2012, for \$650 million, and the last one, for \$673 million, in 2013.

Since 2010, bondholders, the government of Puerto Rico, as well as their high-paid consultants, had to be aware that P.R.E.P.A. would never be able to repay such debts. The F.O.M.B. itself stated on an adversary complaint that P.R.E.P.A. was technically insolvent by 2011:

“Since no later than fiscal year 2011, and possibly earlier than such time, PREPA became dependent on debt to cover operating revenue shortfalls. During this time, PREPA also was unable to fund infrastructure needed to comply with current and anticipated regulation and to maintain safe and reliable service to its ratepayers.”⁴²

⁴¹ House Concurrent Resolution 356 (passed by the House of Representatives on November 10, 2022).

⁴² Civil Case No. 17-04780-LTS, ¶42, <https://reorg-research.com/pdf/2066548.pdf>

557
558 If the utility was technically insolvent, why would the F.O.M.B. ignore its
559 responsibility to perform a comprehensive audit of the ten bond issues authorized in
560 2010, 2012 and 2013?

561 Some will argue that it's too late to question the facts and circumstances
562 surrounding the 2010-2013 bond issues. The negotiations and litigation over
563 P.R.E.P.A.'s debt have taken almost a decade to complete. But, for some reason,
564 F.O.M.B. decided not to address the questionable practices surrounding numerous
565 bond issues of this failed utility.

566 The F.O.M.B. has access to several studies questioning the legitimacy of
567 P.R.E.P.A.'s bond issues.

568 Perhaps one of the first of these studies was authorized by the local House of
569 Representatives in 2015.⁴³ The House Committee performed a comprehensive
570 analysis of the prospectus and financial statements related to all bond issues between
571 2000-2012, as well as the engineering reports required to issue the bonds.

572 As stated before, the 1974 Trust Agreement required that the funds raised
573 through bond issues were to be used for capital improvements of P.R.E.P.A.'s
574 infrastructure.

⁴³ *Informe Final de la Cámara de Representantes de Puerto Rico sobre la R. de la C. 1049*, Comisión de Pequeños y Medianos Negocios, Comercio, Industria y Telecomunicaciones (24 de junio de 2015) <http://www.tucamarapr.org/dnncamara/Documents/Measures/52658e55-06a5-4eef-aea7-27da0ab0f984.pdf>

575 The comprehensive House report concluded that, from the \$12 billion raised by
576 P.R.E.P.A.'s bond issues between 2000-2012, only \$2.7 billion were destined to capital
577 improvements.⁴⁴ The report goes on to explain that P.R.E.P.A. used \$8.5 billion from
578 those bond issues to refinance debt and pay due interest.⁴⁵ Between 2007-2013, only
579 31% of the funds obtained through bond issues were actually used by P.R.E.P.A. for
580 capital improvements.⁴⁶ P.R.E.P.A. used most of the \$12 billion obtained between
581 2000-2012 to, as the popular saying goes, "pay the Visa with the Mastercard".

582 The 2015 House report uncovered multiple irregularities from the "consulting
583 engineer" that, according to the 1974 Trust Agreement, had an important role to play
584 in the process of authorizing P.R.E.P.A.'s bond issues.

585 The F.O.M.B. authorized a comprehensive report on Puerto Rico debt from
586 Kobre & Kim.⁴⁷ The Kobre & Kim revealed several irregularities in the process of
587 issuing P.R.E.P.A.'s debt. For instance, the "consulting engineer" certified on his
588 2009-2013 reports that P.R.E.P.A.'s infrastructure was in good condition; that the
589 utility would receive sufficient revenue, and that P.R.E.P.A. would be able to perform
590 on a reserve of 120% for the payment of principal and interest of the bonds.⁴⁸

⁴⁴ Id., at 13.

⁴⁵ Id.

⁴⁶ Carrie Sloan & Saqib Bhatti, *Wall Street's Power Grab in Puerto Rico*, ReFund America Project, 3 (May 25, 2017) <https://acrecampaigns.org/wp-content/uploads/2020/04/WallStreetsPowerGrabInPuertoRico-May2017.pdf>

⁴⁷ Kobre & Kim, *Special Investigative Report*, 122 (August 20, 2018) <https://www.documentcloud.org/documents/4777926-FOMB-Final-Investigative-Report-Kobre-amp-Kim.html>

⁴⁸ Id., at 135-137.

591 Obviously, the so-called “consulting engineer” was providing false information to
592 allow P.R.E.P.A. to incur significant debt.

593 Kobre & Kim’s report shows how the utility misrepresented its financial
594 information and projections to do the bond issues. ⁴⁹ P.R.E.P.A., of course, has already
595 admitted that, between 2011-2016, its rates were insufficient to even cover their
596 operational expenses. ⁵⁰

597 Pursuant to Act No. 97-2015, the government of Puerto Rico created the Puerto
598 Rico Commission for the Audit of Public Credit. This Commission authorized a report
599 on P.R.E.P.A.’s 2013 bond issue. ⁵¹ This report reveals several irregularities of this
600 bond issue, P.R.E.P.A.’s last.

601 P.R.E.P.A. fell victim to the irresponsible traffic of “toxic swaps”. ⁵² The reports
602 reveal potential conflicts of interest among financial institutions and consultants.
603 Some institutions negotiated “interest rate swaps” for P.R.E.P.A., and later acted as
604 underwriters of bond issues to cause P.R.E.P.A. to pay them “termination penalties”
605 from those same swaps. ⁵³ P.R.E.P.A. also fell victim to illegitimate “*scoop and toss*”
606 practices. ⁵⁴ Financial institutions and consultants caused the utility to issue bonds

⁴⁹ Id.

⁵⁰ Id., at 141.

⁵¹ Puerto Rico Commission for the Comprehensive Audit of the Public Credit, *Pre-audit Survey Report*, <http://sptpr.net/wp-content/uploads/2016/10/Second-Interim-Pre-Audit-Report-on-2013-PREPA-debt-emission-con-anejos.pdf>

⁵² Sloan & Bhatti, *supra* note 46, at 7-8.

⁵³ Id., at 8.

⁵⁴ Id. at 5.

607 to refinance debt.⁵⁵ Entities providing counsel to P.R.E.P.A., or who underwrote
608 those bond issues, profited from the refinance of such debts.⁵⁶

609 Who stood to profit in the process of allowing P.R.E.P.A. to dig itself into an
610 impossible \$9 billion hole of debt? What was the role of credit rating agencies,
611 financial institutions, engineers, counsel, accounting firms, government officials,
612 regulators, in contributing to P.R.E.P.A.'s to collapse?

613 It is not too late to question the legitimacy of P.R.E.P.A.'s bonds issued between
614 2010-2013. The nonsubsidized customers of P.R.E.P.A., who stand to pay a
615 substantial "Legacy Charge" for 35 years if the SAPOA is finally approved, deserve
616 no less.

617 **Q. What consequences would the Plan have, if approved, on PR public policy on**
618 **energy? Would the Plan promote renewable and distributed energy?**

619 Does the SAPOA – and its 35-year "Legacy Charge" – help promote the
620 aggressive integration of renewables, as ordered by Act No. 17-2019 and the current
621 Integrated Resources Plan?

622 The aggressive integration of renewable power into Puerto Rico's energy
623 system is the main public policy objective of Act No. 17-2019. As previously stated,
624 Puerto Rico's R.P.S. includes aggressive mandates: a 20% target of renewables by

⁵⁵ *Informe Final de la Cámara de Representantes de Puerto Rico sobre la R. de la C. 1049*, supra note 43, at 19.

⁵⁶ *Id.*, at 8-9.

2022; 40% by 2025; 60% by 2040, and 100% by 2050. Puerto Rico is yet to comply with its current R.P.S.

The SAPOA fails to include any facts or analysis as to the potential impact of the “Legacy Charge” on achieving the R.P.S. The SAPOA is silent on the analysis on how residential solar PV net metering and grid defection from residential, commercial, and industrial customers – discussed in the current I.R.P.⁵⁷ – may impact expected revenues collected from the “Legacy Charge”. Recently, LUMA disclosed that 78,000 customers had already entered the net metering program: 54,000 customer connections to rooftop solar in 21 months, representing 330 MW added to the grid.⁵⁸ Industry sources estimate that an average of 3,400 interconnections are being achieved monthly.

If grid defection and net metering, as well as the proposed exemption to already subsidized customer classes, reduce PREPA’s expected revenues from its “Legacy Charge”, who will end up paying the debt subject to the SAPOA? Will the F.O.M.B. seek to impose any kind of “solar tax” – illegal under Act No. 17-2019 – or severely limit net metering.

The failure of the SAPOA to answer those questions puts into question the possibilities of full compliance with Puerto Rico’s energy policy.

⁵⁷ Final Resolution and Order – In re: Integrated Resource Plan, Case No. CEPR-AP-2018-0001 (August 24, 2020) <https://aldia.microjuris.com/wp-content/uploads/2020/08/orden-y-resoluciocc81n-final-sobre-plan-integrado-de-recursos.pdf>

⁵⁸ Anne Fischer, *Puerto Rico moves into seventh place for residential solar per capita*, PV Magazine (April 21, 2023)

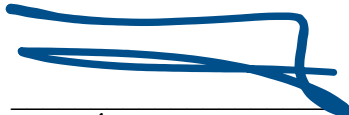
645 **CONCLUSION**

646 The SAPOA recognizes the jurisdiction of the energy regulator, the PREB, to
647 approve the “Legacy Charge”. One of the “conditions precedent” of the SAPOA is that
648 “PREB is required to approve the Legacy Charge as a rate, fee, and/or charge
649 necessary to guarantee that Reorganized PREPA meets its obligations to holders of
650 New Bonds”. ⁵⁹ If the SAPOA is approved, PREB will then be in position to decide
651 whether it complies with Puerto Rico’s energy policy.

652 Based on the abovementioned statements, it is my opinion that the Second
653 Amended Plan of Adjustment (SAPOA) for P.R.E.P.A. runs counter to Puerto Rico’s
654 current energy policy.

655 **I declare under penalty of perjury pursuant to the laws of the United States of**
656 **America that the foregoing is true and correct to the best of my knowledge and belief.**

657
658 **Dated: April 28, 2023.**

659 

660
661 **RAMÓN-LUIS NIEVES, ESQ.**

⁵⁹ SAPOA, Article XXXI(A)(b)(ix), and Article XXXI(A)(d).